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No. 89-1298

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,

Petitioner,

v.

PERRY McCLENDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MOTION AND BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

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MOTION OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

The American Paper Institute, Inc. ("API") hereby moves for leave to file the attached brief *amicus curiae* in support of a petition for a writ of certiorari. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondent was requested but refused.

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce more than 90% of the pulp, paper and paperboard manufactured in the United States. At issue in this case is the Supreme Court of Texas' decision that a cause of action for wrongful

discharge exists under Texas law when an employee alleges that the principal reasons for his termination was the employer's desire to avoid contributing to or paying employee benefits. The Supreme Court of Texas held, with minimal discussion, that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action recognized by the court.

API is interested in this action because its members sponsor various employee benefit plans, and many API members have employees in several states. The Supreme Court of Texas' decision rejecting ERISA's preemptive effect, if allowed to stand, will have deleterious effects throughout the paper industry, as well as on employers in other industries. This decision encourages wrongful discharge actions and permits conflicting and inconsistent state and local decisions whenever an employee alleges that the reason for a discharge was the employer's desire to deprive the employee of employee benefits or to avoid benefit contributions. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on the issue of ERISA preemption.

Based on the foregoing, the motion for leave to file the attached brief *amicus curiae* should be granted.

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BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

American Paper Institute, Inc. ("API") respectfully submits this petition, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of a petition for a writ of certiorari to the Supreme Court of Texas.

INTEREST OF THE AMICUS CURIAE

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce more than 90% of the pulp, paper and paperboard manufactured in the United States. API respectfully submits this brief *amicus curiae* to urge the Supreme Court to grant the petition for

a writ of certiorari to the Supreme Court of Texas. The latter Court held incorrectly that a cause of action for wrongful discharge exists under Texas law when an employee alleges that the principal reason for his termination was the employer's desire to avoid contributing to or paying employee benefits. The Supreme Court of Texas held, with minimal discussion, that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action. API is interested in this action because its members sponsor various employee benefit plans, and many API members have employees in several states. The Supreme Court of Texas' decision rejecting ERISA's preemptive effect, if allowed to stand, will have deleterious effects throughout the paper industry, as well as on employers in other industries. This decision encourages wrongful discharge actions and permits conflicting and inconsistent state and local decisions whenever an employee alleges that the reason for a discharge was the employer's desire to deprive the employee of employee benefits or to avoid benefit contributions.

ARGUMENT

I

PUBLIC POLICY MANDATES THAT ERISA PREEMPT STATE WRONGFUL DISCHARGE ACTIONS RELATING TO EMPLOYEE BENEFIT PLANS

As the Court recognized in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), it is not surprising that the Court is again called upon to interpret the scope of ERISA preemption "[g]iven the 'statutory complexity' of ERISA's three pre-emption provisions, as well as the wide variety of state statutory and decisional law arguably affected by the federal pre-emption provisions . . . ." supra at 47 (citation omitted). The decision of the Supreme Court of Texas

presents important ERISA preemption issues which have not been addressed by the Court. Further, the opinion conflicts with decisions of various federal circuit courts and the Supreme Court of West Virginia. *See Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989), *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981), and *Conaway v. Eastern Associated Coal Corp.*, 358 S.E. 2d 423 (W. Va. 1986).

The Court has never squarely addressed whether ERISA preempts state wrongful discharge actions involving benefit issues. *Pilot Life, supra, Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), addressed related issues concerning preemption of state common law claims and statutes, but did not address wrongful discharge actions.

This is a critical issue to the members of API, as well as employers in other industries. A recent study has shown that approximately 39 states have recognized in various circumstances that an employee has a common law right of action for wrongful termination where the discharge violates public policy. Four other states have not ruled out recognition of a public policy exception. I. Shepard, P. Heylman and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 18, BNA Special Report (1989). At least one other state and two federal district courts have recognized a cause of action for wrongful discharge based upon allegations of intended interference with potential pension benefits. *See K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1365 (Nev. 1987). *See also Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980), *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 557-58 (E.D.N.Y. 1981).*

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* In none of these cases did the court discuss ERISA preemption.

If the decision below is not reviewed and reversed by the Court, employers will be bombarded with wrongful discharge claims alleging that a discharge was prompted to avoid payment of employee benefits. The Supreme Court of Texas' decision also held that an employer who discharges an employee in order to avoid benefit contributions commits a tort under state law. Whenever an employee covered by a benefit plan is terminated, a result is cessation of benefit contributions on behalf of the former employee. If the decision below is permitted to stand, every discharge may be challenged in state court on this theory. Employers will be subjected to a multiplicity of state wrongful discharge actions decided under different rules, laws, and decisional authority.

II

PREEMPTION OF WRONGFUL DISCHARGE CLAIMS FURTHERS THE PURPOSE OF ERISA PREEMPTION

It is ironic that the Supreme Court of Texas, in holding that a Texas wrongful discharge cause of action exists, cited ERISA Section 510, 29 U.S.C. § 1140, to support its proposition that public policy recognizes the importance of protecting employees' interests in pension plans. The Texas Court added, "[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes". *McClendon v Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 (Texas 1989). The Supreme Court of Texas' own opinion recognizes the strong federal interest in regulating wrongful discharge actions relating to benefit claims.

Preemption of state wrongful discharge claims relating to employee benefit plans furthers the purpose of ERISA preemption. ERISA's unique preemption provisions were designed to develop a body of federal substantive law to

resolve issues involving rights and obligations under employee benefit plans. *See Firestone Tire and Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). In enacting ERISA, Congress intended to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974) (remarks by Representative Dent). Consequently, Congress preempted state law if it "relates to" employee benefit plans. The Court has on several occasions, broadly interpreted, the preemption provisions of ERISA. *See Pilot Life Ins. Co. v. Dedeaux, supra* at 46, *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), *Shaw v. Delta Air Lines, Inc., supra* at 98, *Alessi v. Raybestos-Manhattan, Inc., supra* at 523. The decision below undermines the application of the uniform national standards of conduct that ERISA was designed to create and is contrary to the Court's interpretation of ERISA preemption. *See* ERISA Section 2(b), 29 U.S.C. § 1001(b).

III

ERISA SECTION 510 EXPLICITLY APPLIES TO WRONGFUL DISCHARGE ACTIONS AND IS PART OF ERISA'S COMPREHENSIVE CIVIL ENFORCEMENT SCHEME

Section 510 of ERISA explicitly applies to claims of wrongful discharge relating to benefit claims. Section 510 states, in relevant part,:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

Violations of Section 510 are enforced pursuant to the civil enforcement scheme set forth in ERISA. *See* Section 502(a), 29 U.S.C. § 1132(a). The Court has recognized the comprehensive nature of ERISA's enforcement provisions. *Pilot Life Ins. Co., supra* at 46. State law causes of actions modelled on Section 510 improperly intrude on the exclusive reservation to federal authority of the sole power to regulate the field of employee benefits.

ERISA protects not only employee benefits; Section 510 protects participants and beneficiaries from adverse employment actions related to their ERISA rights. This section applies to any claim of improper discharge relating to benefits. Perry McClendon alleges that he was discharged for the purpose of interfering with his right to a pension. This claim falls squarely within the ambit of Section 510 and is clearly preempted. *See, e.g., Dister v. Continental Group Inc.*, 859 F.2d 1108 (2d Cir. 1988), *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

The Supreme Court of Texas, in rejecting ERISA preemption, appears to emphasize the damages available under state tort law which may not be available under ERISA, such as punitive damages and compensation for mental anguish. In addition, under a state wrongful discharge action, there may be a right to a jury trial, which may not be present under ERISA. The policy choices reflected in the selection of remedies under ERISA would be "completely undermined" if employees were free to obtain remedies under state law that Congress rejected in ERISA. *Pilot Life, supra* at 42; *see also Authier v. Ginsberg*, 757 F.2d 796, 801-2 (6th Cir. 1985).* As stated by the Court in *Pilot Life*:

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* The remedies provided under ERISA are extremely broad and include injunctive relief, appropriate equitable relief, and reasonable attorneys' fees and costs. ERISA Section 502(a) and (g), 29 U.S.C. §§ 1132(a) and (g).

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Pilot Life, supra, at p. 54.

If state courts are permitted to grant remedies in actions relating to employee benefits that were expressly rejected by Congress in drafting ERISA, the exclusive federal regulatory scheme will be emasculated.

IV

THE CLAIM BELOW "RELATES TO" AN EMPLOYEE BENEFIT PLAN AND IS PREEMPTED

The Supreme Court of Texas concluded that ERISA preemption was not applicable because the plaintiff was not seeking lost pension benefits but was instead seeking future wages, compensation for mental anguish and punitive damages as a result of the wrongful discharge. *McClendon, supra* at 71. This case raises important questions concerning the interpretation of the term "relate to" as set forth in ERISA Section 514(a), 29 U.S.C. § 1144(a).

The Supreme Court of Texas completely ignored this Court's analysis concerning the meaning of the term "relate to any employee benefit plan" set forth in Section 514(a). The Court has interpreted the term "relate to" expansively. *See Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, (1987), *Metropolitan Life Insurance Co. v. Massachusetts, supra, Alessi v. Raybestos-Manhattan, Inc., supra*. In *Shaw v. Delta Air Lines, Inc., supra* at 97, the Court held that the phrase should be given its broad common-sense meaning, such that a state law "relates to" an employee benefit plan if it has a "connection with or reference to such a plan".

For example, in *Pilot Life*, an employee brought state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan. The Court stated that the employee's state common law claims of tortious breach of contract, breach of fiduciary duties, and fraud in the inducement "related to" an employee benefit plan and fell under ERISA's preemption provisions. *supra* at 47. *But see Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989).

In the case below, Perry McClendon alleges that Ingersoll-Rand terminated him to escape its obligation to contribute to his pension fund. Despite his failure to seek pension benefits, his claim plainly relates to the Company's pension plan. A "common-sense" understanding of the phrase "relates to" leads to the conclusion that this case is preempted by ERISA. *Shaw, supra*, at 97.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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